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STATE STATUTE AND COMMON LAW.¹

IV.

WHEN, in the United States, we distinguish statutory from common law, we habitually think only of the different sources from which two bodies of law proceed. The antithesis, in our minds, is between judge-made law and that enacted by legislatures. But (if we leave the federal statutes out of the question) there is another and very important difference. Our state statutes are local law, while the common law, as its name implies, is a national system. This, the political point of view, has been strangely ignored in all recent discussions concerning the advisability and the effect of state codifications.

That this point of view has been neglected is due to a lack of agreement upon the principal premise. It is not uniformly recognized that our common law is a national system. Even in the Supreme Court of the United States it has been said, *obiter*, that there is no national law except the constitution, the treaties and the laws of the United States.² Now it is quite true that there is no other *supreme* national law; no other law, that is, which overrides the statutes of the single states. But the law which regularly prevails in the absence of other law, national or local, may properly be called national law, and it is in this sense only that the term is applied to the common law. It is our *subsidiary* national law.

It has also been said, again in the Supreme Court of the United States, that the common law obtains only so far as it has been "adopted by the several states, each for itself."³ This is not quite true. Under the constitution and laws of the

¹ A previous paper, discussing the same topics from a different point of view, was published in the *POLITICAL SCIENCE QUARTERLY*, vol. ii. no. 1, p. 105.

² *Wheaton vs. Peters*, 8 Peters 591, 657 ff.

³ *Wheaton vs. Peters*; *Smith vs. Alabama*, 124 U.S. 465, 478.

United States lies, as the recognized basis of interpretation, the law which our forefathers brought from England;¹ and in every domain of jurisdiction assigned to the federal judiciary, this law in fact prevails in the absence of opposing statutory law, national or local. In the single states, on the other hand, it is true that the common law obtains only so far as it has been adopted; but the adoption was not dependent upon any legislative act. The English common law lay at the basis of our colonial civilization, and the acts by which the majority of our commonwealths recognized or "adopted" it were simply declaratory. It would no more have ceased to prevail in the absence of such acts than would the English language. Except where its rules are absolutely inapplicable, and except in those parts of the country where it is not a national heritage — where the colonists and all their institutions were French or Spanish, — the English common law, in the absence of opposing statutes, is the law of the land.

The recognition of this fact, that our common law is a national system, is further impeded by the method in which it has been developed since the establishment of our independence, and by the legal theories under which this development has proceeded. Its interpretation — which of course means its development — has been largely entrusted, under our constitutional system, to the state courts; and it has been difficult for the layman, and still more difficult for the lawyer, to conceive that a law interpreted by the judiciaries of nearly forty independent states, could remain for more than a century really national. And even in the federal courts, the natural organs for the development of national law, the fact that the law applied is national has been cloaked from the outset under a contrary theory. Barring the cases where the United States courts apply supreme national law, — that is, the constitution, treaties and laws of the United States, — their jurisdiction rests upon the following provision of the constitution :

The judicial power shall extend . . . to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and

¹ *Smith vs. Alabama, loc. cit.*

maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more states ; between a state and citizens of another state ; between citizens of different states ; between citizens of the same state claiming lands under grants of different states ; and between a state, or the citizens thereof, and foreign states, citizens or subjects.¹

In the exercise of this jurisdiction, the United States courts are controlled by the Judiciary act of 1789, chapter 20, section 34, which provides :

That the *laws of the several states*, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

In all cases, therefore, where the federal courts obtain jurisdiction under the constitution and laws of the United States, and where no provision of the supreme federal law is applicable, they are obliged first to determine in what state the law governing the case is to be sought, and then to find and apply the law of that state.

But how has the Supreme Court of the United States interpreted this command ? It has declared, in an unbroken series of decisions, that if the law governing the case is common law, it (the Supreme Court) is not bound by the interpretation placed upon that law by the courts of any state, but will follow its own judgment. In 1838 Justice Story said :

Questions of a general and commercial nature . . . are not deemed by the courts of the United States to be matters of local law, in which the courts of the United States are positively bound by the decisions of the state courts. They are deemed questions of general commercial jurisprudence, in which every court is at liberty to follow its own opinion.²

In 1842 the Supreme Court at Washington declared :

In all the various cases which have hitherto come before us for decision, this court have uniformly supposed, that the true interpretation

¹ The jurisdiction granted by this clause is limited, of course, as far as suits against states are concerned, by the eleventh amendment.

² *Robinson vs. Commercial Insurance Co.*, 3 Sumner 220, 225.

of the thirty-fourth section limited its application to state law strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals. . . . It has never been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes, . . . as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law.¹

These decisions have been followed, in uninterrupted line, by others of like import.² In the construction of a deed conveying land in the state of Maine, the federal court disregarded the views of the supreme court of that state, asserting its right to interpret "matters and language belonging to the common law" as it saw fit.³ In the exercise of its equitable jurisdiction,⁴ and in its ecclesiastical decisions, it has always maintained equally free hand. In a case of the latter sort, that of *Watson vs. Jones*,⁵ the Supreme Court of the United States had occasion to apply the law of Kentucky; and, finding no statute, overturned the decision of the supreme court of that state, and at the same time departed from the English decisions — thus making absolutely new law.

But *what* law is this — this law which the Supreme Court of the United States creates, changes and destroys at its will? Is it state law, or is it national law? In some cases the court seems to avoid the question. In commercial cases it has more than once declared that the commercial law is "international"; but it does not seem in any such case to have sought its precedents outside of the English and American reports. In other cases, it has sometimes declared the question to be one of "gen-

¹ *Swift vs. Tyson*, 16 Peters 1, 19.

² *Carpenter vs. Providence Insurance Co.*, 16 Peters 495, 511; *Foxcroft vs. Mallett*, 4 Howard 353, 379; *Meade vs. Beale*, Taney 339, 360; *Oates vs. National Bank*, 100 U.S. 239, 246; *Railroad Co. vs. National Bank*, 102 U.S. 14, 29; *Williams vs. Suffolk Insurance Co.*, 3 Sumner 270, 276; *Austin vs. Miller*, 5 McLean 153, 157; *Gloucester Insurance Co. vs. Younger*, 2 Curtis 322, 339; *The Brig George*, Olcott 89, 101.

³ *Foxcroft vs. Mallett*, 4 Howard 353, 379.

⁴ *Neves vs. Scott*, 13 Howard 272, and cases there cited.

⁵ 13 Wallace 679. For discussion of this case, see Burgess, *Religious Associations*, *Andover Review*, July 1887.

eral jurisprudence"; but where this phrase is used, it is not demonstrable that the principles of general jurisprudence resorted to were other than those of the common law. As a rule, however, the court asserts or implies that, in interpreting and applying the common law, it is actually enforcing "the laws of the several states," as the Judiciary act directs. The latest declaration to this effect occurs in the case of *Smith vs. Alabama*, decided January 30, 1888. Mr. Justice Matthews, who delivered the opinion of the court, said :

A determination in a given case of what that [the state] law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co. vs. Lockwood*, 17 Wallace 357, where the common law prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; *but the law as applied was none the less the law of that state.*

It seems clear to me, on the contrary, that the law applied in the case of *Railroad Co. vs. Lockwood* was not the law of New York. According to all legal logic, the interpretation placed upon the law of a state by its highest court is the law of that state; and if a court of Kentucky, or a court of the United States, in pretending to apply a rule of New York law, gives it a different interpretation and effect from that which the highest New York court has given, then neither the Kentucky nor the United States court applies the law of New York. This consideration has been conclusive with the Supreme Court of the United States as far as state statutes are concerned. When the state law is statutory, the federal courts recognize the authority of the state interpretation, declaring that a well-settled construction is a local *rule*.¹ But the argument is really

¹ *Burgess vs. Seligman*, 107 U. S. 20, 33, and cases there cited; *Flash vs. Conn.*, 109 U. S. 371, 378; *Gibson vs. Lyon*, 115 U. S. 439, 445; *Norton vs. Shelby County*,

stronger when the rule governing a particular question is of judicial origin. A statute is one thing and its interpretation is another. Different courts may give diverse interpretations, and maintain in each case that they are applying the statute. But a rule of common law exists only in its interpretation; it is nothing but a series of concurrent decisions. Change its interpretation, and you change the thing.

The theory of the Supreme Court, that in putting its own interpretation upon common law it is applying state law, is therefore obviously a legal fiction. But this fiction is a power. It has been said that the English Parliament could not make a man a woman; but it could establish a legal fiction to that effect, and cause a particular man to be subjected to all legal disabilities which attach themselves to womanhood. The federal courts cannot make their interpretation of the common law "law *of* the several states"; the logical impossibility in this case is as complete as the natural in the other; but they can make their interpretation law *in* the several states, as far as their jurisdiction extends, and this they have done.

And the fiction is a necessary one. It was forced upon the federal courts by the language of the Judiciary act, which in fact recognizes no national law except "the constitution, treaties [and] statutes of the United States." Without this fiction the Supreme Court of the United States would be reduced to a subordinate and unworthy position. It would discharge, as against the supreme court of any single commonwealth, the office of a district court, following the decisions of a higher tribunal. It would then be only logical, instead of removing cases from the state to the federal courts on writ of error, to give defeated suitors appeal from the Supreme Court at Washington to the supreme court of the state whose law is recognized as determinant of the issue. Without this fiction, again,

118 U. S. 425, 439; *Hanrick vs. Patrick*, 119 U. S. 156, 170. — Such cases as *Ohio Insurance Co. vs. Debolt*, 16 Howard 416, 432; *Watson vs. Tarpley*, 18 Howard 517, 520; and *Pine Grove vs. Talcott*, 19 Wallace 666, 677, form no exception to the rule. These decisions rest upon the clause in the federal constitution forbidding the states to impair the obligation of contract; a prohibition which, in the view of the Supreme Court, extends to state courts as well as state legislatures.

our common law could hardly have remained what it is, a substantially uniform system. Every student of state reports knows how great an influence the federal interpretation of the common law has exercised upon our state courts; how often a side current of state decisions has been drawn back into the main stream of judicial interpretation by a decision of the supreme federal tribunal. Unchecked by the great authority of this court, the interpretation of the common law in the different states must have been far less consistent. The law of each state would have diverged from that of the others, until the common law of the nation had become a meaningless phrase.

When it is remembered that the Supreme Court has been able to maintain its uniform interpretation of the law only by steadily affirming that the national law which it applies is state law, the paradox is perfect. The court has kept our common law national by ignoring the existence of a national common law. It is one of the cases, not infrequent in legal history, where a legal fiction keeps law in harmony with political verities.

The position taken by the Supreme Court of the United States has necessarily exercised a great influence upon the state courts. They too, while affirming the common law to be state law, have treated it as a national system;¹ they have always paid great regard, not only to the decisions of the federal courts, but to those rendered in other states; they have always discussed with especial interest those cases where the views held by courts of different commonwealths are found to be in conflict, and they have generally been animated by a

¹ In *Faulkner vs. Hart*, 82 N.Y. 413, the New York Court of Appeals followed the theory of the federal courts. The law governing the case, it was recognized, was the law prevailing in Massachusetts; but in Massachusetts the law concerning the point at issue was common law; and in interpreting the common (commercial) law, the New York court declared itself in no wise bound to follow the decisions of the Massachusetts courts. It accordingly decided the case on its own theory of the common law. This, to my mind, involves a recognition of the national character of the common law. The court disclaimed the intention of applying New York law, and undertook to apply the law prevailing in Massachusetts; but it certainly did not apply Massachusetts law, for the case, it was conceded, would have been decided by the Massachusetts courts in the opposite sense; therefore the common law, in Massachusetts, is not simply Massachusetts law.

sincere desire to bring out of such discords a more perfect harmony. In a word, they have done their best to keep the common law common. This effort is doubtless due, in part, to considerations of public policy. Our judges are well aware that conflicting decisions cause practical inconvenience, embarrassing business and confusing family relations. But another and more subtle influence has made for unity in the development of our judicial law,—I mean the theory of the common law itself concerning the source of its rules. Theoretically, the special rules of the common law are derived from a pre-existing body of general principles, and when a new question arises the answer is to be found by deducing from some recognized principle the required new rule.¹ This conception has great and beneficent results. Since every case is regarded as a scientific problem, to be solved by logical deduction from established premises, contradictory results awaken a certain impatience. Jurists who differ in their conclusions are eager to detect the

¹ In point of fact, the rules of every legal system are ultimately determined by social needs, and the principles (which are nothing but very general rules) are obtained by induction from the (special) rules. But as the work of induction goes on, and the formulation of principles becomes more perfect, new rules can be and are obtained by deduction from accepted principles. In this sense, the theory of the common law is true. But this does not invalidate my assertion that the rules are ultimately determined by social interests; for if the rule obtained by deduction does not work well (*i.e.*, does not correspond to the social necessities which it is designed to meet), it is discarded, and a "positive" rule, accepted *contra tenorem juris* and *propter utilitatem*, is set in its stead. Then the principle is burdened with an exception, and perhaps with a second and a third; until the development of juristic science shows that the principle was wrongly formulated, and so recasts it that all the exceptions become corollaries. In this sense it is perpetually true that the principles themselves are determined by induction. Just as the rules of judge-made law are "working rules," subject to continual amendment, so the principles are "working hypotheses," subject to continual correction—and therefore capable of continuous development.

But the decision of a concrete case, in a court of law, is always a deductive operation. In the simplest cases, the opinion of the court is reducible to a syllogism, of which the major premise contains the rule of law, the minor premise the facts of the case, and the conclusion the decision. In more complicated cases, the judicial reasoning consists of a series of syllogisms. When a new rule has to be formulated, a syllogism is employed in which the major premise is one of those broad generalizations which we call principles. When I say that these principles are really obtained by induction, I assert what John Stuart Mill, in his famous discussion of the syllogism, claims to be true of major premises generally; see his *System of Logic*, book ii, ch. iii.

cause of the difference, the error in their own reasoning or the fallacy in that of their opponents. The comparison of conflicting decisions thus becomes not merely natural but inevitable; and their discussion is less apt to be barren of result than most controversies, because the disputants commonly admit each other's premises. Even under these conditions, argument will not always produce agreement; but agreement is infinitely easier than it would be if the courts approached new questions as legislators do, and endeavored to solve every problem by a direct appeal to "public policy." Agreement, in fact, has so generally been attained, that, in spite of the limitless possibility of divergence afforded by the number of our states and the independence of their courts, the interpretation of the common law remains fairly uniform throughout the Union.

From the point of view here taken, we have in the United States four great bodies of law:

- (1) The constitution, treaties and statutes of the United States;
- (2) The constitutions and statutes of the several states;
- (3) The common law as interpreted by the federal courts; and
- (4) The common law as interpreted by the state courts.

Of these, the first represents strictly national law; and the third and fourth, although in theory local, are really national also. The second, on the other hand, in theory and in fact alike, is simply and strictly local. The order of validity is that in which I have placed them. Each of these bodies of law overrides those which follow, and each is overridden by those which precede. The entire common law is thus at the mercy of our state legislatures. As soon as a state statute seizes the ground previously occupied by a rule of common law, not only are the state courts bound to give it effect, but the federal courts, in applying the law of that state, are bound not merely by the words of the statute but also (as the Supreme Court has regularly declared) by the interpretation placed upon that statute by the highest court of the state. Every state statute which invades the domain of the common law therefore invades and *pro tanto* destroys the subsidiary national law of the land.

Now a code, as the phrase is commonly understood, is intended to supersede the entire common law of the state in which it is enacted. It is intended to make the law of that state wholly statutory. Accordingly, the adoption of such codes in all our states would entirely destroy our subsidiary national law. It may be objected that the intent of the codifier is usually not to change, but to declare, the common law. To this the obvious and immediate answer is, that all the codes that have been adopted, and all that are proposed, do in fact involve changes. But even if this were not the case, and even if we assume, for the sake of argument, the establishment in each of the several states of codes simply declaratory of pre-existing common law, the point of greatest consequence is not touched. The chief question is: What will be the effect of the general adoption of state codes upon the general *development* of our law? For law, it must always be remembered, cannot remain stationary. It must change with the changing form and needs of the society which it rules.

What, in the first place, will be the effect as regards the development of our law by interpretation? As far as the single states are concerned, the inevitable results have been sketched in my previous paper. The effect upon the nation at large, upon the unity of our law, remains to be noticed. Unless the Supreme Court of the United States changes its practice, the construction of all these codes will lie wholly with our state judiciaries.¹ If the Supreme Court adheres to the rule it has heretofore recognized, and follows the construction placed upon each state statute by the highest state court, the controlling influence which the federal judiciary now exercises upon the interpretation of our common law will disappear. And not only will this regulative influence vanish, but another force that has worked for harmony in our state decisions will cease to be felt. From the standpoint

¹ It is noticeable that in its more recent decisions the Supreme Court does not say that it is bound to follow the state courts in their construction of state statutes, but that it does this "for the sake of harmony and to avoid confusion." If, therefore, greater confusion would be caused by following conflicting constructions of similar statutes in different states, it seems probable that the court would change its practice.

of legal science, the interpretation of words is a much lower and less interesting problem than the deduction of rules from principles; and since the construction of our code law in the different states will turn largely upon the exact meaning of words, the state courts will take much less interest in, and pay far less heed to, each others' decisions than is now their custom.

Judicial interpretation, however, will play but an insignificant part in the development of code law. Codification means the substantial transfer of the law-making function, within the domain now occupied by common law, from the federal and state judiciaries to the state legislatures. The question of the development of our law, regarded from the national standpoint, accordingly shapes itself as follows:—How will our state legislatures acquit themselves of this task? Will they show the same comprehension of the needs of the nation, the same disposition to keep its law uniform, which the state judiciaries have manifested? I fear these questions can hardly be answered in the affirmative. Forty-six state and territorial legislatures cannot be expected to work with harmony of purpose and unity of result. There is for them no such regulative central influence as is exercised over our state judiciaries by the Supreme Court of the United States; there is for them no such agreement upon the premises and methods of their action as exists for our state courts in the theory of the common law. The prime aim of the state legislator, be he ever so honest and ever so able, is to serve the people of his section, to defend their peculiar interests and to realize their peculiar wants. If by chance he rises above the needs of his section, he is limited by his office to the consideration of the interests of his state. It is not his duty to take thought for the American people. These *a priori* conclusions are confirmed by facts. In those portions of the law of which our state legislatures have assumed control, there is a lamentable and increasing divergence. I have shown in my previous paper that, in our codeless states, a natural and unconscious division has been made in the field of legislation; that the legislators have taken control of all questions which directly involve a social interest (public law), but have left to

the courts those matters in which the interests affected are primarily individual (private law).¹ From the standpoint of the state, this adjustment is satisfactory; from that of the nation, it is not. There are many questions which fall within the domain of public law, and of which our state legislators have assumed control, in which the nation has an interest higher than that of the state—the interest of unity. Our state legislators, rightly leaving the great body of our commercial law in the control of the courts, have generally enacted and have largely changed the law of commercial paper and that of interest and usury; and they have assumed almost entire control of the law of marriage and divorce.² In both cases they have acted rightly, from their point of view; for all these subjects involve direct public interests. But the result of their action has been disastrous to the country at large. It is precisely in commercial law and in the law of marriage and divorce, that the national need of uniform law is strongest. Diversity of commercial rules in the several states impedes and annoys business, for American business pays little heed to state lines. Conflicting laws of marriage and divorce unsettle family relations and undermine the moral basis of society.

The degree of confusion which our laws of marriage and divorce have reached, is a matter of common notoriety. It is possible, for example, that a man married in New York, divorced and re-married in Indiana, shall be the lawful husband of one woman in Indiana, and shall be regarded by the law of New York as the husband of another. By the law of Indiana his status is completely regular; by the law of New York he is a bigamist. He may have a second family of children, who by the law of Indiana are legitimate, but by the law of New York are bastards. It is needless to insist upon these facts, because the matter is already so universally regulated by statute that codification can do no harm. They are instanced here simply to

¹ The peculiar sense in which I employ these words, public and private, is explained in my previous paper, p. 122.

² See the data furnished by Mr. Stimson, *ibid.* pp. 117, 118.

illustrate the tendency of our state legislations to diverge upon matters of national concern.

In the domain of commercial law, the case is different. There is already legislation enough, and enough conflict of legislation, to harass the business of the country. At every meeting of the American Bankers' association, for example, complaints are made and resolutions passed concerning the diversity of the bankrupt laws and the laws regulating commercial paper in the different states; and committees are regularly appointed to urge upon Congress the necessity of passing a national law of bankruptcy, and other committees to consider the possibility of obtaining more uniform legislation in reference to bills and notes.¹ But in the domain of commercial law, the inroads of the state legislations have been comparatively trifling. In the main, the law of movable property and of contracts is still common law, and its development is still in the hands of our federal and state judiciaries. Here then the general adoption of state codes will work a great change; and if our state legislatures, in assuming control of this field, show the same indifference to the business interests of the nation which they have shown to its moral interests in their treatment of the marriage and divorce laws, the results will be, not more serious, for nothing can be more serious than the demoralization of our people, but certainly grave in the extreme.

I think I have maintained the theses with which I opened this discussion:² that the ultimate effects of state codification are far more important than those which lie upon the surface; and that the relation of the movement to the general development of our law is vastly more important than its results for good or evil in any single state.

Considering, now, that a number of our states have already adopted complete civil codes, or codes which claim, at least, to cover the entire field of the common law; and con-

¹ The proceedings of the annual conventions of this association are regularly published, and can be obtained from the secretary, 237 Broadway, New York City. It is useless to cite years and pages, because *all* of the recent proceedings that I have examined contain these complaints and resolutions.

² See my previous paper, p. 105.

sidering the pertinacity of the movement in other states, I am tempted to go beyond the original plan of this discussion and endeavor to forecast the ultimate consequences of this threatened denationalization of our law. If my views were the outcome of pure speculation, or the result of a balancing of probabilities, I should not undertake this task. But, on the contrary, they rest upon the experience of other nations, whose legal development, in its earlier stages, is so strikingly analogous to our own that I cannot avoid the conclusion that we are destined to traverse the further stages which they have completed or are completing. Shakespeare has stated very accurately the possibilities and the limitations of historical inference, in affirming that a man who observes "the nature of the times deceased"

. . . may prophesy,
With a near aim, of the main chance of things
As yet not come to life, which in their seeds
And weak beginnings lie intreasuréd.
Such things become the hatch and brood of time.

V.

The evolution of continental European law, since the sixteenth century, may be summarized, roughly, as follows: general or common law is gradually destroyed by local codes, and these local codes are ultimately replaced by national codes. To comprehend this development, we must start far back of the sixteenth century. We must go back to the overthrow of the West Roman empire, in the fifth century, and follow, at least in its main lines, the movement of European law during the intermediate thousand years.

The conquerors of the Roman empire were barbarians. They swept away, not the rule of Rome only, but its civilization. They did not attempt to maintain and enforce its laws; they lived by their own simple tribal customs. On the other hand, they made no systematic attempt to destroy the Roman law or to force Germanic usages upon the conquered Romans. They suffered these to live by their own law. But in the wreck of

the Roman civilization, the Romans had no longer any use for a highly evolved system of jurisprudence. The Roman law survived only as a body of adages and rules—the local custom of separate communities.

In the midst of this general destruction, something—and not a little—was saved by the church. The German conquerors were, or soon became Christians. They left the organization of the church intact, and suffered it to control its own personnel and to manage its own affairs. It did this, and more. It assumed many state functions, which the rude governments of the middle ages were unable to discharge. It cared for education and dispensed charity. It drew into its domain the entire control of the family relations. It undertook, partly in its own interest, to enforce testaments. It was able to do all this, because it had brought over from the Roman into the mediæval world a well-developed governmental organization. It added to this a complete system of courts, with appeal to Rome. In the exercise of its judicial powers, it developed an extensive body of law—the *jus canonicum*.

The states that arose on the ruins of the empire—if the kingdoms of the Goths, the Burgundians and the Franks can be called states—confined their governmental activity to military affairs and the maintenance of the peace. The popular courts administered the rough justice of the time, which consisted chiefly in the redress of torts. It was not until one of these states conquered and annexed the others and the kings of the Franks became rulers of Christendom, that the legal development of Europe entered upon a new phase. Charlemagne, especially, laid the basis for a development of German usage into European law. He imposed upon the different tribes a body of imperial laws, passed with the consent of the magnates, and a body of equity law developed and enforced by a king's bench and a system of circuit courts. He brought the county courts more fully under central control, and introduced numerous reforms in procedure. But all these innovations perished with the destruction of the Carolingian empire. The kingdoms which established themselves in its place were king-

doms in name only. They were feudalized from top to bottom. The offices of the empire became hereditary fiefs, and the magnates petty princes. Nor did the disintegration of the state stop with the independence of the crown vassals: the sub-vassals fought themselves, and later the cities bought themselves, free from all real control. The development of law became wholly particularistic. Each province, each city, each village and each manor even, evolved usages which, as local custom, overrode any higher law. Besides this local divergence, there arose distinctions of class: one law for the noble, another for the burgher, another for the free peasant and still another for the villain. And across the entire network of local laws and local courts, stretched the independent jurisdiction of the church. This state of things lasted, to fix a rough boundary line, until the latter part of the thirteenth century.

In England, the conditions were quite different. The Norman conquest had given the island a strong monarchy. In England, the Carolingian institutions reappeared: king's bench, circuit courts, local judges appointed by the crown—an orderly and centralized administration of justice. The national common law of England was already in process of development.

On the continent, nothing of the sort was possible. Neither in France, Germany nor Italy, was there any power capable of centralizing justice and creating national law. But European commerce had come to life again and assumed great importance, and the diversity and the resulting uncertainty of law were intolerable. The result was the singular historical phenomenon which we call the "reception" of the Roman civil law. In Justinian's digest the Italian jurists of the twelfth century found a system of law that was adequate to the needs of the new commerce. Schools of Roman law sprang up in Italy, were visited by students from all parts of Europe, and sent out masters and doctors by the hundreds. Returning to their homes, the civil doctors crowded the hereditary expounders of local usage off the judicial bench; under the fostering care of the kings and princes, there appeared a "learned judiciary." The law the doctors had learned was nearly a thousand years old

and was written in a dead language, but it was not regarded by them, nor by their countrymen, as foreign law. All authority in Europe was derived ultimately from the Roman empire, and the Roman law was the law of the "sacred predecessors" of the German emperors and the French kings. Thus continental Europe obtained a common commercial law in the *corpus juris civilis*, as it had obtained a common family law in the *corpus juris canonici*. This development was completed, roughly speaking, in the sixteenth century.

It should be noted that both these legal systems, although embodied in what are called codes, are systems of case law. The most important part of Justinian's compilation, the digest or pandects, is essentially a collection of decisions upon stated facts; and most of the imperial constitutions are nothing more. The same is true of the code of canon law compiled by Gratian about 1140, and enlarged by the addition of later decretals; for the papal decretals were usually decisions of actual cases. As case law, these codes were treated by the jurists and the courts with a certain scientific freedom, very much as our common law is treated by our courts. The *dicta* of the Roman jurists, emperors and popes were not construed like statutes. And for this reason again, the courts were able to develop new law from the old, finding the needed rules by analogy or deduction, precisely as do our courts. So there grew up, on the basis of the Justinian digest, a *novus usus pandectarum*; and the development of law kept pace, after a fashion, with the needs of society.

It should be noted, again, that these systems were "received" as subsidiary law only. Local law, whether written or customary, prevailed; and only in its absence was common law applicable. But the civil doctors had little love for local usage, and demanded clear and complete evidence of its existence; which was not always easily obtainable. Thus in Germany the Roman civil law, especially during the period of the reception, overrode and destroyed many rules of German customary law.

The reception, as I have said, was completed in the sixteenth century. Since that time, this subsidiary common law, resting upon and developed by judicial decisions, has been replaced

everywhere save in a portion of Germany, and is in process of being superseded in Germany also, by codes of a statutory character, enacted by the legislative power. From these facts it is customary to draw the simple inference that code law is better than judge-made law. But a careful study of European codification¹ leaves this apparently obvious inference doubtful, and suggests other — and, I think, far more important — conclusions.

In France, the particularistic development of law was checked, after the thirteenth century, by the growing power of the monarchy. The kings became strong enough to make the parliament of Paris a supreme court of appeal for the whole of France, and to control the procedure of the local courts. This judicial centralization gradually lessened the diversity of the local laws, but it came too late to enable the royal courts to develop a common law. In the southern provinces, where a rude form of Roman law had maintained itself, the Justinian law-books were received, but only as subsidiary law; they prevailed only when the provincial customs furnished no rule of decision; and the provincial customs were themselves subordinated in the same way to the custom of each locality. In the northern provinces, single institutions and rules of the Roman law were adopted, but the *corpus juris civilis* was not received. The law remained customary. In course of time the customs were all reduced to writing, *i.e.*, codified; at first, in the thirteenth century, by private enterprise; later, in the course of the fifteenth and sixteenth centuries, under royal direction. Royal codification involved many changes or “reformations,” largely in the direction of greater unity of law. But more was

¹ For the whole movement, but especially for Germany, see Behrend, *Die neueren Privatrechts-Kodifikationen*, in Holtzendorff's *Encyclopädie der Rechtswissenschaft*, 4. Aufl. (1882). For France in particular, see Zachariä, *Handbuch des französischen Civilrechts*, Bd. I, §§ 7 ff., and Schäffner, *Geschichte der Rechtsverfassung in Frankreich*, Bd. IV, S. 304 ff. For Italy, Huc, *Le Code civil italien et le Code Napoléon* (1868), § 1, and authorities there cited. For Switzerland, de Riedmatten, *Notice sur le mouvement législatif en Suisse, et spécialement sur les derniers projets de codification*, in the *Bulletin de la Société de législation comparée*, 1880, pp. 455 *et seq.*

accomplished in this direction by the royal power of ordinance, which, as the monarchy became more absolute, developed into a general power of legislation. The *Ordonnance civile* of 1667, the *Ordonnance criminelle* of 1670, and the *Ordonnance de commerce* of 1673 were practically codes of civil and criminal procedure and of the law merchant. But at the outbreak of the Revolution, in spite of all these reforms, France was far from possessing unity of law. The *pays du droit écrit* in the south and the *pays coutumiers* in the north had fundamentally different systems: the one was Germanic, with Roman infiltrations; the other Roman, with Germanic excrescences. In the conquered eastern provinces, the Netherlands and the *terres d'empire*, the legal systems were again divergent. And within these four great divisions were hundreds of codified customs, provincial and local. This state of things was intolerable. Unity of law was one of the popular demands in 1789. The "complaints and grievances" which the delegates of the local estates carried up to the Estates General in that year, were full of protests against this "diversity of customs, which, so to say, makes the subjects of the same realm, and often of the same province, foreigners to each other." It was demanded "that the provinces sacrifice to the nation their particular constitutions, capitulations and treaties," and that "a common law," "a general, uniform, national code" be established for all the realm.¹ The revolutionary assemblies declared, from time to time, in their laws and constitutions, that this should be done; that "a general and uniform code of civil laws" should be established;² and the Convention caused a code to be drafted, but rejected the draft because it contained "no new and grand ideas, suitable to the regenerated France." Law was being made and unmade too rapidly to permit codification. It was not until the revolutionary storm had spent its force, and the first consul had established a strong and conservative government, that the desire of

¹ Cahiers des États Generaux: I, 747 (Amiens); II, 524 (Cambrai); II, 593 (Chalons sur Marne); III, 83, 84 (Vienne); III, 100 (Bayonne); IV, 260 (Montreuil sur mer); V, 288 (Paris *intra muros*); V, 571 (Riom); VI, 230 (Fismes).

² L. 16 (24) août, 1790, tit. 2, art. 19; const. 3 (14) sept. 1791, tit. I (*in fine*); const. 24 juin, 1793, art. 85.

the nation could be realized. When Portalis introduced the first sections of the civil code into the *Corps Législatif* in 1803, he indicated, tersely and accurately, the causes which had led to codification, in declaring :

Up to this time the diversity of our customs constituted, in one and the same state, a hundred different states. The law, opposed everywhere to itself, divided the citizens instead of uniting them. This condition of things could not last longer.

And Grenier answered, in the same strain :

As regards the diversity of its laws, France was in almost the same state in which Cæsar found it : *Hi omnes linguâ, institutis, legibus inter se differunt*.¹

Italy, which had given Europe common law, was unable to keep its own law common. Unlike the other nations of Europe, the Italians had not even the semblance of a national organization ; and the development of law, whether by judicial decisions or by legislation, was necessarily particularistic. In the kingdom of Naples and Sicily, a civil code based upon the code Napoleon was published in 1819 ; and the kingdom of Sardinia was governed by a code of its own after 1838. In the other states, the basis of the law was Roman ; but the development of this law was not uniform, and the superimposed statute law was of course different in each state. The Italian jurists reckoned four or five "principal systems" of law in the peninsula. As soon as Italy obtained a central government and a national legislature, the Italians gave themselves a national law. The work began in 1860, and the civil code was published in 1865.

The completed reception of the Roman law in Germany, and the beginning of a reaction against its rule, are almost synchronous. Germany had obtained a common law, but it was after all foreign law. Many of its rules seemed unnatural to the German instinct, and were not adapted to the needs of

¹ Code civil ou recueil des lois qui le composent, avec les discours, rapports et opinions (Paris, 1806), I, 2, 34.

German society. Moreover, the enthusiastic devotion with which its theoretical symmetry inspired the civil doctors had resulted, as we have seen, in the reception of many rules of Roman law at the cost of genuine German law, embodied in unwritten local usage. But organs for the creation of national law were wholly lacking. The empire had been losing ground and the "territories" gaining independence since the thirteenth century. The result of the religious wars in the sixteenth and seventeenth centuries was the definite disintegration of Germany. There were imperial courts; but the more important states obtained exemption from appeal. There was an imperial diet, theoretically capable of legislation; but after passing a criminal code (with great reluctance and with careful reservation of established local usages) in the reign of Charles V, this body lapsed into permanent sterility. In the eighteenth century the empire was a mere shadow, and this shadow was destroyed by the revolutionary wars. In 1815 Germany was reorganized as a confederation of sovereign states—a confederation destitute of executive, judicial or legislative authority.

From the period of the reception, accordingly, the development of the law rested with the single states. In the seventeenth century, collections of local "statutes" began to be made. These were merely rules of German customary law. In the eighteenth century, attempts were made to codify the subsidiary Roman law also, in order to remove uncertainties that had arisen in the practice of the courts. So there came into existence the Prussian (provincial) code of 1721, and the Bavarian code of 1756. In both cases, the common law remained subsidiary to the code. Very different in purpose and character were the Prussian code of 1794, the Austrian code of 1811 and the Saxon code of 1863. These law-books endeavored to fuse the subsidiary Roman law and the local German usage; they were really codifications of the entire state law. The Prussian code left divergent provincial customs in force; but the Austrian and Saxon codes swept them away. All three abolished the subsidiary common law of Germany. Finally, during the revolutionary wars, the code Napoleon was introduced in the

western part of Germany, and it remained in force in Baden and the Prussian Rhine province after the overthrow of the Napoleonic empire.

The abrogation of the "foreign law" was a relief in the codifying states, but the destruction of the common law was felt to be a disadvantage to Germany. The movement for unification of the law, for the creation of a national German law, began early in this century. Thibaut's pamphlet, *On the necessity of a general civil law for Germany* (1814), called forth Savigny's famous reply, *On the vocation of our time for legislation and jurisprudence*. Savigny took the ground that German legal science was not ripe for the undertaking, and also set forth the objections to code law in a way that has never been surpassed. That nothing came of Thibaut's suggestion was due less to the force of Savigny's arguments, than to the fact that the German confederation had no legislative power. Popular dissatisfaction constantly increased, and the popular demand for national law, especially in commercial matters, grew steadily stronger. The German parliament of 1848-9 took measures for the codification of the commercial law; but the revolutionary government did not last long enough to complete the task. The plan was taken up again in 1856, at the suggestion of Bavaria, and a commercial code was actually drafted. The Federal Diet had no power to enact this code; but it was adopted, with slight modifications, in all the single states.

The establishment of the North German confederation in 1867, and of the German empire in 1870, gave Germany a strong federal government. The constitution gave the federal legislature complete control over criminal law, civil and criminal procedure, and commercial law; and in 1869 the commercial code was revised and made federal law, in 1871 a criminal code went into force and in 1877 a code of civil and criminal procedure. In the domain of civil law, the constitution gave to the federal legislature power over obligations only. In the constituent parliament of 1867, an amendment was proposed bringing the entire civil law within the federal competence; but the bill failed to obtain a majority even in the

popular branch of the legislature, the Imperial Diet. In 1869 the same amendment was passed by the Diet, but was thrown out by the house of states, the Federal Council. The same thing happened in 1871 and 1872; the Imperial Diet passed the amendment and the Federal Council rejected it. In 1873 the amendment was passed a fourth time by the Imperial Diet, and resolutions in its favor were secured from the legislatures of the two most important states, Prussia and Bavaria. The Federal Council thereupon abandoned its opposition, accepted the amendment, and appointed a commission to draft a German civil code. This commission has been working ever since; with German deliberation, certainly, and, it is to be hoped, with German thoroughness also. The preliminary draft is now completed and will soon be published.

The debates to which this amendment gave rise, both in the imperial and the state legislatures, are full of interest and suggestion. It is pointed out that there are four principal systems of law existing in the empire, namely, the Prussian, French and Saxon codifications and the common law, with an infinite number of local variations. In the Imperial Diet, the National-Liberal deputy Miquel said:

I believe all thoughtful jurists agree that such a state of things cannot continue, now that we have a common German representative body, capable of expressing the will of the whole people; that as a nation we must desire to set in the place of these various codifications a common German law.¹

In the Bavarian chamber of deputies, the minister of justice, von Fäustle, declared:

We are dealing here, gentlemen, with a domain in which the German efforts toward unity first made themselves felt. . . . While in earlier times, in the main at least, the common law mediated the inner community of the German legal life, it became evident after the dissolution of the German empire that the numerous particularistic developments of law and the efforts of the several states to proceed independently in the establishment of their private law . . . worked harm only. Our legal life and science were thereby deprived of that inner community, the destruc-

¹ *Verhandlungen des 1. deutschen Reichstags*, 2. Session, S. 206 (Oct. 25, 1871).

tion of which was necessarily as prejudicial to the scientific culture of the law as to the satisfaction of the practical needs of the nation.¹

The opposition in the Imperial Diet, as in the Federal Council, was based on state-rights theories. The leader of the Guelphs, Windhorst, declared that the adoption of the amendment meant the destruction of the federal character of the German union, and the basement of the German sovereigns to the position of the *Standesherren*. "In twenty-five years," he asserted, "the house of Wittelsbach will hold the position which the house of Hohenlohe holds now." To this the most distinguished of living publicists, Professor Rudolf Gneist, responded:

If I took the federalistic point of view, I should feel bound to support just this proposal, because it establishes the sole condition upon which the independence of the single states in matters of internal administration can be maintained. For the centralization of administration does not arise through uniform legislation, adapted to the situation and to the needs of the time, but through the lack of organs for such legislation, which forces the state to furnish what is needed by the organization of a centralized bureaucracy [durch die Gewalten der Executive des Präfectenthums].²

In comparison with the great national movements described above, the legal development of the smaller states of Europe is of slight importance. In many cases, through a natural dislike for legal isolation, these states have adopted codes patterned on those of their greater neighbors, or of the countries with which their commercial relations are most important. But there is one of these smaller countries which is developing, by codification, an independent system of law, and in which the movement is of especial interest because the form of the state, as in Germany, is federal.

The Swiss cantons did not receive the Justinian law when it forced its way into the rest of the empire. The conditions of life were so primitive that the old local usages were amply

¹ Speech of Nov. 8, 1873, reprinted in Hirth, *Annalen des deutschen Reichs*, 1874, S. 329 ff.

² *Verhandlungen des 1. deutschen Reichstags*, 4. Session, I, 176 (April 2, 1873).

sufficient. As the confederacy grew in size and its civilization became less simple, no federal law was developed, because the confederation possessed no law-making powers. These resided in the single cantons. Each canton, accordingly, went its own way. Six or seven established codes copied, with more or less modification, from the code Napoleon. About the same number followed the Austrian model. Zurich enacted an independent codification of its own. The rest of the cantons lived by their old customary law, more or less fixed by decisions and more or less modified by legislation. Switzerland thus possessed a variety of legal systems fairly comparable to that which obtains in Germany.

This diversity of legislations produced the usual reaction, a movement toward unity. The obstacle to any thorough reform lay, as in Germany, in the constitution. In 1872 a constitutional amendment was submitted to the people, bringing the whole civil law within the legislative competence of the confederacy; but it failed of adoption. In 1874 a general revision of the constitution took place; and the revised constitution, which was accepted by the people, gave the federal legislature control of marriage, civil status, civil capacity, all matters relating to commerce, transactions concerning movables, literary and artistic property, the prosecution of debt, and bankruptcy. In 1881 federal laws were passed regulating civil capacity and obligations. The law of obligations is practically a code of commercial law in the widest sense, including the law of contracts and that of movable property.

VI.

The preceding sketch of European codification yields some important results. The movement in Europe to-day is national. Its object is to substitute uniform law for divergent local legislations. The relative merits of case law and statute law have not been and are not in question. The issue, in many cases, is between a single national code and a variety of local codes; in all cases, between national law and local law. And in every

case the decision has fallen in favor of national law. From this point of view, the fact that France and Italy have codified their civil law, and that Germany is about to follow their example, is no reason why New York or any other American state should codify. The movements are not analogous, but diametrically opposed. In Europe, the purpose of codification is to obtain common national law; in this country the effect of state codification is to destroy our national common law.

To obtain any analogy to the movement now in progress in our country we must go back of the European movement of to-day. State codification in the United States falls in line with the codification of the provincial customs of France; with the Neapolitan and Sardinian codifications in Italy; with the Prussian and Saxon codifications in Germany; and with the cantonal codifications of Switzerland. But when we make this comparison, we must remember that in all these countries the local development of law was the result of the non-existence or the atrophy of all central law-making organs. In no case were active and productive central organs deliberately put out of action; in no case was the development of national law deliberately arrested. It has been left to American codifiers to propose this—for the first time in legal history.

It should be remembered, finally, that the whole development of continental European law differs from that of the English law in one fundamental point. The Norman conquest gave England a centralized governmental machinery and made the gradual and organic development of national law possible. The destruction of the Carolingian empire left Europe without law-making organs. Lacking these, no European state was able to develop common national law; and this inability resulted in the general acceptance of foreign law. Accordingly when the nations of Europe worked their way out of feudalism and developed effective governmental organizations, they naturally proceeded to rid themselves of the foreign law by substituting law of their own making. But the only method by which this could be done was codification: local codification, if the law-making power was local; national codification when the legislative power became national.

The agitation for codification in England, to-day, is in line neither with the continental movement nor with the American. It has neither the reasons in its favor which justify national codification in Europe, nor the reasons against it which militate against state codification in this country. The European codes substitute national statutes for local statutes. American codes substitute local statutes for common case law. England, if it codifies, will simply substitute one form of national law for another, statute law for case law.

Finally, the study of the codification movement in Europe gives us strong reason to believe that the ultimate result of the general adoption of state codes in this country will be a transfer of legislative power from the state legislatures to Congress, and the ultimate re-nationalization of our law by federal legislation. Everywhere in Europe the demand for legal unity has been precisely proportioned to the amount of legal diversity. If patriotic impulses have had much to do with the demand for national law, as was notably the case in Italy, it is true on the other hand that the inconveniences and annoyances caused by conflicting local legislations have everywhere been a potent factor in fostering a spirit of national patriotism. All political feelings are the product and expression of social interests.

The history of the movement in Germany and Switzerland is especially suggestive, because in these federal states the proposal to increase the legislative power of the central government encountered prejudices precisely similar to those which exist in the United States. The triumph of the national idea in Germany and Switzerland was not the result of feeling, as in Italy, but of the overwhelming pressure of material interests. From this point of view, any indication, in the United States, that the divergence of state legislations is causing people to look to the federal government for relief, becomes of extreme importance. Any proposals to enlarge the legislative powers of Congress by constitutional amendment or change of constitutional interpretation, however sporadic they may be, are symptoms not to be slighted. The divergence of our state laws is causing most trouble, as we have seen, in the matters of mar-

riage and divorce, and of commercial paper. Here, then, we should look for symptoms of an appeal to federal legislation; and here we find such symptoms.

The agitation for more uniform laws of marriage and divorce sometimes culminates in the demand that some association or committee of right-thinking and zealous citizens shall frame such uniform laws, and that sufficient pressure to compel their passage shall be brought to bear upon the several state legislatures. But if uniform laws are desirable, and if the state legislatures, in order that the laws may be uniform, are to be reduced to the position of assenting bodies simply, there seems no reason why their assent should be sought at all, or why the uniform laws should be framed by an irresponsible committee of reformers rather than by the elected representatives of the nation. Accordingly, the more radical demand is heard with increasing frequency—the demand for a constitutional amendment which shall give Congress complete and exclusive control of marriage and divorce. That so conservative a newspaper as *The (New York) Sun* favors this solution, is an excellent illustration of the pliancy of political theories under the pressure of social needs.

The conflict of state laws concerning commercial paper, and the annoyances and losses suffered in consequence by the business men of the country, have occasioned much discussion, as has been remarked already, at the annual conventions of the American Bankers' association. Here again we find that Congress is to give relief; and that Congress is to be enabled to give relief by a more liberal interpretation of the constitution. In 1882 the convention passed the following resolutions:

That the executive committee be directed to ascertain: (1) The laws in the several states in regard to commercial paper, and especially the variations and differences therein. (2) Whether, under the constitutional power given to Congress to "regulate commerce between the several states," it is not competent for Congress to enact laws governing commercial paper drawn in one state upon a party in another, or made in one state and payable in another, so that such laws shall be uniform throughout the nation. (3) Whether it be expedient for Congress to exercise such power if the constitution confers it.

It is an interesting fact that Hamilton thought that this clause of the constitution would cover such legislation.¹ The Supreme Court has construed the word "commerce" more narrowly; but if such a law as the above resolution contemplates were actually passed by Congress, in response to an urgent popular demand, it is not inconceivable that it might be pronounced constitutional.

Whether it be by change of constitutional interpretation or by direct constitutional amendment, there is no doubt, I think, that the nation will find a way to keep its law national. No theory of state rights, no jealousy or fear of centralization, will prevent so practical a people as ours from satisfying its real needs. If the encroachment of state statutes upon common law goes much further, if business relations become as uncertain and confused as marriage relations have become already, the state-rights theory will either disappear or, more probably, change its form. Like all political theories, it has a kernel of truth and expresses a real social interest. In administrative matters, the greatest practical development of local self-rule is not only desirable, but essential to the perpetuity of free government. This will be seen more clearly as our governmental problems become more complex and difficult; and the tendency to decentralize administration will probably result in an increased autonomy of our cities and counties. But it will be seen, also, that the making of laws concerning matters of national interest is no legitimate function of local government, and that an American citizen is no freer because these laws are made at Albany or Trenton than he would be were they made at Washington.

MUNROE SMITH.

¹ Works, Lodge's edition, III, 204.